No. 92-190

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Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF IDAHO, EX REL. DIRECTOR,
IDAHO DEPARTMENT OF WATER RESOURCES,
Respondent.

On Writ of Certiorari
To The Supreme Court of Idaho

BRIEF OF AMICI CURIAE NEZ PERCE TRIBE, KLAMATH TRIBE, TULE RIVER TRIBE, KLAMATH ALLOTTEE WATER USERS ASSOCIATION AND CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION IN SUPPORT OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE IDAHO SUPREME COURT'S DECISION SEVERELY UNDERMINES THE ABILITY OF INDIAN TRIBES, AND THE UNITED STATES AS TRUSTEE, TO ASSERT AND DEFEND TRIBAL WATER RIGHTS IN IDAHO AND OTHER WESTERN STATES.	5
II. WAIVERS OF SOVEREIGN IMMUNITY ARE TO BE NARROWLY CONSTRUED, ESPECIALLY WHERE, AS HERE, THE RIGHTS OF OTHER SOVEREIGNS ARE AFFECTED.	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page(s)
Arizona v. California, 373 U.S. 546 (1963)	1,5
Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983)	9
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	8,9
Department of Ecology v. Acquavella, No. 77-2-01484-5.1 *Memorandum Opinion* (Yakima County Sup. Ct., May 22, 1990), *appeal docketed*, No. 57798-6 (Wash. S.Ct.)	1
Heckman v. United States, 224 U.S. 413 (1912)	5
Nevada v. United States, 463 U.S. 110 (1983)	1,5,6
Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, ___U.S. ___, 111 S.Ct. 905 (1991)	9
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	9
Sohappy v. Smith, 302 F.Supp. 899 (D. Or. 1969)	2
Tulee v. Washington, 315 U.S. 681 (1942)	10
United States v. Adair, 723 F.2d 1394 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984)	1,3
United States v. Oregon, 913 F.2d 576 (9th Cir. 1990)	2
United States v. Winans, 198 U.S. 371 (1905)	1
United States and Klamath Tribe v. State of Oregon, Dep't of Water Resources, 774 F.Supp. 1568 (D. Or. 1991)	3
Washington v. Passenger Fishing Vessel Ass'n, 443 U.S. 6583 (1979)	2
Winters v. United States, 207 U.S. 564 (1908)	1

Table of Authorities Continued

	Page
Statutes:	
12 Stat. 957 (June 11, 1855)	2
14 Stat. 647 (June 9, 1863)	2
McCarran Amendment, 43 U.S.C. § 666(a)	1,8,9
Or. Rev. Stat. § 539.081(1)	3,7
Or. Rev. Stat. § 539.081(4)	3
Books, Miscellaneous:	
I Kappler, *Indian Affairs—Laws and Treaties* (GPO, 1904)	4
Nat'l Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States (GPO, 1973)	10

INTEREST OF AMICI CURIAE

Amici curiae are four federally recognized Indian tribes and an association of Indian allotment owners.[1] All amici have claims to reserved water rights which may be adjudicated in state courts pursuant to the terms of the McCarran Amendment, 43 U.S.C. § 666(a).

When Indian tribes negotiated treaties with the United States they reserved enough water to fulfill the purposes underlying the establishment of their reservations. These federally reserved rights include water for agricultural uses and treaty-protected fisheries, whether the reservation was created by treaty or Executive Order. *Arizona v. California*, 373 U.S. 546, 598 (1963); *Winters v. United States*, 207 U.S. 564 (1908); *Department of Ecology v. Acquavella*, No. 77-2-01484-5, *Memorandum Opinion* (Yakima County Sup. Ct., May 22, 1990), *appeal docketed*, No. 57798-6 (Wash. S.Ct.) (treaty language identical to the Nez Perce Treaty); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *see United States v. Winans*, 198 U.S. 371, 381 (1905).

Tribal water rights are held in trust by the United States for the benefit of tribes. As trustee, the United States prepares and advances tribal water claims in state or federal water adjudications. This Court has made clear that the United States, as trustee in water cases, is not held to the high fiduciary standards of a private trustee. *Nevada v. United States*, 463 U.S. 110 (1983). Thus, tribes must participate in their own name in water adjudications if they are to assure that their rights are fully asserted. *Id.*

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[1] Filed herewith is Idaho's consent to the filing of this brief.

The preparation and assertion of tribal water claims is an enormously expensive undertaking requiring biologists, hydrologists, engineers, historians, anthropologists and economists. The Idaho statutory scheme adds an exorbitant burden to simply file a water rights claim. Budgets for water rights claim development are already inadequate and imposition of "filing fees" to bankroll state water adjudications will make it virtually impossible for tribes to effectively bring their claims. Just as the now defunct poll tax prevented racial minorities from exercising their right to vote, the imposition of these filing fees will effectively deny Indian tribes the ability to quantify their reserved water rights.

The Nez Perce Tribe is directly affected by the decision of the Supreme Court of Idaho because the Nez Perce Reservation lies within the Snake River Basin Adjudication area. The treaties which established the Nez Perce Reservation expressly reserved fishing rights both on and off the Reservation.[2] 12 Stat. 957, art. III (June 11, 1855); 14 Stat. 647 (June 9, 1863). These rights have since been interpreted to provide a right of up to fifty percent of the available fish harvest. *Sohappy v. Smith*, 302 F.Supp. 899, 911 (D. Or. 1969);[3] *see Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). For the past five years the Nez Perce Tribe has been working with the Bureau of Indian Affairs, the Department of the Interior Solicitor's Office and the Department of Justice

[2] The Confederated Tribes of the Umatilla Indian Reservation in Oregon have water rights claims based on treaty language similar to that of the Nez Perce Treaties.

[3] A description of the lengthy history of this litigation is found in United States v. Oregon, 913 F.2d 576 (9th Cir. 1990).

to develop the claims that will be made in the Snake River Basin Adjudication on behalf of the Tribe.

In Oregon, the United States is now facing state administrative proceedings to quantify federal and, as the Klamath Tribe's trustee, tribal water rights in the Klamath River Basin Adjudication. The existence of the tribe's rights was declared in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), but the quantification was left to later proceedings.[4] In these proceedings, the Tribe's right to water to support its treaty-protected fishing, hunting and gathering rights will be quantified. These water rights are essential to the survival of the Tribe since the various fish and wildlife species upon which the Tribe depends are themselves dependent upon an adequate supply of water.

Oregon, like Idaho, asserts authority to exact "filing fees" from the United States, on pain of forfeiture of federal water rights, to "pay for the expenses of the [Water Resources] department" in registering and determining water rights claims. Or. Rev. Stat. § 539.081(4). The statutes are ambiguous as to the amount of fees for large federal water claims such as those for instream flows, wetlands, or lake maintenance. *See* Or. Rev. Stat. § 539.081(1).[5]

[4] For a description of the water rights of the Klamath Allottees, *see* United States v. Adair, 723 F.2d at 1415-17.

[5] These fees were unsuccessfully challenged in United States and Klamath Tribe v. State of Oregon, Dep't of Water Resources, 774 F.Supp. 1568 (D. Or. 1991). While the Oregon fees statutes currently exempt federal claims for non-consumptive uses on behalf of Indian tribes, the State continues to assert authority to exact fees for claims for tribal consumptive uses and all non-Indian federal uses such as forestry, parks, fisheries and wildlife.

The Tule River Tribe in California occupies a reservation that was established in 1873 pursuant to an Executive Order. I Kappler, *Indian Affairs—Laws and Treaties* 830-31 (GPO, 1904). The Tule River Tribe has continuously used the waters of the South Fork of the Tule River, although the Tribe's water rights have not been formally adjudicated. This is a common situation in California. Of the nearly 100 tribes in California only five have adjudicated water rights. If the Idaho Supreme Court's decision is upheld, the State of California will have license to impose a filing fee scheme similar to that of Idaho to finance its own water rights adjudication.

Amici curiae have a vital interest in the outcome of this case. Their water rights are protected by the United States as trustee. Consequently, any implied waiver of federal immunity directly affects them.

SUMMARY OF ARGUMENT

The Idaho Supreme Court's decision authorizes the financing of Idaho's general stream adjudication by charging the United States an estimated ten million dollars in "filing fees." Such fees will undermine the capability of the United States as trustee to assert reserved water right claims on behalf of Indian tribes by diminishing the limited financial resources available to develop and assert the merits of tribal claims. If Idaho can shift the expense of its water adjudication to federal coffers, other western states will be encouraged to do the same.

The Idaho Supreme Court's ruling runs contrary to the law of federal immunity from suit. Strict adherence to this doctrine of immunity is especially important where, as here, Indian property rights and tribal immunity are implicated.

ARGUMENT

I. THE IDAHO SUPREME COURT'S DECISION SEVERELY UNDERMINES THE ABILITY OF INDIAN TRIBES, AND THE UNITED STATES AS TRUSTEE, TO ASSERT AND DEFEND TRIBAL WATER RIGHTS IN IDAHO AND OTHER WESTERN STATES.

Indian tribes will, as a practical matter, be significantly and adversely affected by the decision below. In its capacity as trustee, the United States must file water right claims on behalf of Indian tribes with reserved water rights. This Court has ruled that tribes are bound by state court decrees even if they do not participate in the adjudication and even if the United States does not claim all rights to which the tribe is entitled. *Nevada v. United States*, 463 U.S. 110 (1983); *see Heckman v. United States*, 224 U.S. 413, 444-445 (1912). There are hundreds of tribes with unadjudicated reserved water rights. General stream adjudications are intended to finally adjudicate the rights of all parties. As such, Indian tribes, and the United States on their behalf, must claim sufficient water to provide for present and future needs. *Arizona v. California*, 460 U.S. 605, 617 (1983).

Tribal claims for water encompass not only those amounts necessary for irrigation but also for water to support guaranteed hunting and fishing rights. These latter claims are particularly difficult and expensive to establish and require extensive technical studies by historians, engineers, anthropologists, hydrologists and biologists. The cost for these expert witnesses and consultants is enormous. The United

States supports the bulk of these costs and provides limited funding for the tribes to oversee and supplement the claims developed by the United States. Such monitoring is absolutely essential, given this Court's ruling in *Nevada v. United States*, 463 U.S. 110, 142 (1983) that the United States may be forced to balance its tribal trust obligations in water cases with other federal interests.

The State of Idaho commenced the Snake River Basin Adjudication as part of a complicated settlement of water rights litigation unrelated to tribal rights. Pet. App. 28a (Johnson, J. dissenting). Although not yet a party to the Adjudication, the Nez Perce Tribe has expended considerable amounts of its scarce financial and human resources in assisting the United States, which is a named party, in preparing claims on behalf of the Tribe. The Tribe does not have additional resources to expend in claims preparation. As a result, if the limited federal resources must be expended on filing fees, the Tribe's rights will be at risk.

There is no line item in the federal budget for filing fees. If the Bureau of Indian Affairs is required to pay the exorbitant "filing fees" at issue in this case, the funds available to prepare for the merits of the case will be decimated. The required filing fees will be significantly greater than the annual federal budget available for proof and defense of tribal water rights. Payment of the fees will reduce the already inadequate federal funds available to establish tribal water rights.

Water is a matter of increasing value and dispute throughout the West. As competition for this limited resource grows, the pressure on states to undertake

expensive adjudications of water rights increases. At the same time, states face budget limitations and the need for additional revenues. For example, California's difficulty adopting an effective budget for fiscal year 1993 was widely publicized. And Oregon's state government is saddled with enactment of a ballot initiative that greatly diminishes property taxes and, thus, general fund revenues. The incentive to shift the costs of water adjudications from state to federal budgets is powerful.

If Idaho is successful in its attempt to bankroll its water adjudication at federal expense, other states would be foolish not to follow suit. For its part, Oregon already has enacted laws to impose "filing fees" on the United States. These statutes specify fee amounts for water used for irrigation. Or. Rev. Stat. § 539.081(1). But they are silent as to the amount to be charged for the types of claims that make up the bulk of federal water rights—instream flows, lake level maintenance, and marshlands for fish and wildlife purposes. In the Klamath River Basin Adjudication, Oregon has yet to specify the amount it will demand that the United States pay as "filing fees." The Idaho precedent will establish a benchmark for Oregon's fee calculations.

California has over ninety Indian tribes with unquantified water rights, several major cities with growing water demands, and severe state budget limitations. It is hard to imagine a better incentive for taking advantage of a successful effort by Idaho to use federal money to pay for water adjudications.

Unless the Idaho Supreme Court decision is reversed, tribal reserved water rights will become the victim of states shifting costs in general stream ad-

judications from themselves to the federal government.

II. WAIVERS OF SOVEREIGN IMMUNITY ARE TO BE NARROWLY CONSTRUED, ESPECIALLY WHERE, AS HERE, THE RIGHTS OF OTHER SOVEREIGNS ARE AFFECTED.

It is well settled that implicit waivers of federal immunity are disfavored. Such waivers must be explicit on the face of the statute. *See* Brief of the United States. Amici believe that application of that rule alone mandates reversal of the Idaho Supreme Court's decision. This case, however, implicates more than just federal immunity. The McCarran Amendment, 43 U.S.C. § 666(a), as construed by this Court allows state courts to adjudicate tribal property rights in general stream adjudications. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810 (1976). Because the rights of another sovereign are implicated, this Court should be especially careful to limit the bounds of the waiver of immunity found in the McCarran Amendment.

Important federal rights are at issue in state court cases brought pursuant to the McCarran Amendment. As this Court cautioned in holding that Indian reserved rights were subject to adjudication in state courts under the McCarran Amendment:

> State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, *a particularized and exacting scrutiny* commensurate with the

> powerful federal interest in safeguarding those rights from state encroachment.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983) (emphasis added). This exacting scrutiny is especially appropriate in a case such as this where a state seeks to finance its adversarial expenses by reaching into the federal treasury and removing funds that would otherwise be available for the protection of tribal resources.

"As separate sovereigns, pre-existing the establishment of the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), it is well settled that Indian tribes possess immunity from suit and that Congress has "consistently reiterated its approval of the immunity doctrine." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 910 (1991). This immunity is grounded in the recognized need to protect tribal property and resources from unconsented suit.

However, as a result of the combined effect of the McCarran Amendment and the federal government's trust relationship to tribes, the Nez Perce Tribe's water rights will be adjudicated in state courts, regardless of whether or not the Tribe chooses to voluntarily waive its immunity and participate in its own right. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810 (1976). The ruling of the Idaho Supreme Court allowing imposition of onerous filing fees will further diminish the Tribe's rights. The effect of the Idaho Court's ruling extends the McCarran Amendment's waiver well beyond what is necessary to accomplish the purpose of the Amendment, *i.e.*, placing federal and tribal water rights before state courts. Since the McCarran Amendment

subjects Indian water rights to state court jurisdiction through its waiver of federal sovereign immunity, the waiver should be narrowly construed to provide only the forum—and not a right to raid the federal treasury.

The State of Idaho undoubtedly will assert that tribal treasuries are not at risk because the United States has a "deep pocket" and thus is able to pay the filing fees on behalf of the tribes. Experience dictates, however, that the tribes must not rely solely on the good will of the United States. In cases where the United States determines that a particular tribal claim should not be made, the tribe will be forced to stand alone, make the claim, and thus could be subject to filing fees that, as a practical matter, will preclude an effective defense of such claims.[6] Even in the rare circumstance where the federal government makes all claims asserted by a tribe, the United States' practical ability to represent all tribal interests will be severely undermined, because its financial resources will necessarily be reduced by the amount of the filing fees.

CONCLUSION

History demonstrates the enormous difficulty tribes have had in securing federal protection of their rights. As the National Water Commission stated in 1973, "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters." Nat'l

[6] The assertion of filing fees directly against Indian tribes would fail under the reasoning of this Court's ruling in Tulee v. Washington, 315 U.S. 681 (1942).

Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress ofthe United States 475 (GPO, 1973). The Idaho Court's decision places yet another formidable obstacle in the path of Indian tribes. It should be reversed.

Respectfully submitted,

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